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No. 01-1375

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF ON THE MERITS FOR RESPONDENT, THE NAVAJO NATION

LEVON B. HENRY
Attorney General
BRITT E. CLAPHAM, II
Deputy Attorney General
THE NAVAJO NATION
P.O. Drawer 2010
Window Rock, AZ 86515
(928) 871-6343

RICHARD B. COLLINS
401 UCB
Boulder, CO 80309
(303) 492-5493

PAUL E. FRYE
Counsel of Record
RICHARD W. HUGHES
ROTHSTEIN, DONATELLI,
HUGHES, DAHLSTROM,
SCHOENBURG & FRYE, LLP
500 4th Street NW,
Suite 400
Albuquerque, NM 87102
(505) 243-1443

DAVID O. STEWART
SAMUEL J. BUFFONE
ROPES & GRAY
1301 K Street NW,
Suite 800 East
Washington, D.C. 20005-7008
(202) 626-3900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Federal statutes and regulations govern virtually every aspect of surface coal mining on Indian lands, under a statutory scheme designed to maximize tribal revenues from reservation lands. The question presented is:

Whether, under *United States v. Mitchell*, 463 U.S. 206 (1983), the Navajo Nation stated a claim for breach of trust cognizable under the Tucker Act and the Indian Tucker Act where the Department of the Interior suppressed a well-supported decision raising Navajo coal royalties from extremely low rates, deceived the Navajo Nation and withheld from it key information, forced it to negotiate at a decided disadvantage, and ultimately approved a lease of Navajo coal for far less than every federal study had found reasonable, all in violation of applicable statutes, departmental regulations, and the core trust duties of loyalty, candor, and care.

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BRIEF ON THE MERITS FOR RESPONDENT, THE NAVAJO NATION

STATUTES AND REGULATIONS INVOLVED

The following authorities establish comprehensive federal control and supervision over Navajo coal leasing and impose trust duties on the Government: two treaties between the United States of America and the Navajo Tribe of Indians, 9 Stat. 574 (1849) and 15 Stat. 667 (1868); the Indian mineral leasing statutes, 25 U.S.C. §§ 396a-396g, 399, and implementing regulations, 25 C.F.R. pts. 211[1] and 216 subpart A and 43 C.F.R. pt. 3480; the 1948 Indian right-of-way statute, 25 U.S.C. §§ 323-328, and implementing regulations, 25 C.F.R. pt. 169; the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-640; the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757, and regulations applying FOGRMA to Indian coal, 30 C.F.R. § 206.450 *et seq*. and 25 C.F.R. § 211.40 (applying 30 C.F.R. Chapter II, Subchapters A and C); and the Indian lands section of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1300, and implementing regulations, 25 C.F.R. pt. 216, subpart B, and 30 C.F.R. pts. 750 and 955. These provisions are set forth in the Navajo Lodging, except for relevant provisions of the 1868 Treaty, the Navajo-Hopi Rehabilitation Act, and 25 U.S.C. § 399, set forth in the appendix to this brief. The Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, are set forth in the petition appendix at 86a.

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[1] Unless otherwise noted, references to the Code of Federal Regulations are to the 2001 edition. The Navajo Lodging includes regulations from both the 1985 and 2001 editions.

STATEMENT OF THE CASE

A. Introduction

The Navajo people occupy the largest Indian reservation in the country. Despite significant mineral wealth, the reservation lacks basic infrastructure needed to support a self-sustaining economy. The Navajo Nation government relies significantly on revenues from coal leasing to provide basic services.

Due to its high BTU content, low sulfur content, and favorable stripping ratio, the coal at issue here is "exceptionally valuable." J.A. 81, 86. The United States controls and supervises all aspects of its leasing. The United States arranged and approved a lease for this coal for a pittance (between 20¢ and 37½¢ per ton) in 1964, but reserved Interior Department authority in that lease to adjust the royalty rate after twenty years. J.A. 191, 194.

In 1984, the Bureau of Indian Affairs (BIA) exercised that authority and raised the royalty rate to 20%, based on two federal studies. J.A. 6-9. The lessee, Peabody Coal Company, appealed. After briefing and additional federal studies, the appellate decision maker prepared a final decision affirming the adjustment. J.A. 14-97. However, the Interior Department leaked the pending decision to Peabody before the decision maker could sign it. J.A. 155. Peabody sprang into action, retaining a close friend of the Secretary of the Interior to influence him *ex parte*. J.A. 101-03.

As a result of clandestine meetings with Peabody's agent in July 1985, the Secretary suppressed a well-supported decision to raise royalties from unconscionably low levels. The Department then concealed its actions from the Navajo Nation, misled it about the value of its coal, and forced it to negotiate with Peabody at a decided bargaining disadvantage. For the next two years, the Navajo Nation continued to receive virtually nothing for

its coal. Ultimately, in December 1987, after performing no further economic analysis, the Department approved lease amendments setting royalties at little over one-half the royalty rate that every federal study had found fair. These actions, taken out of "sympath[y]" for Peabody, J.A. 102, sacrificed the Navajo Nation's best single opportunity to move from a welfare economy toward self-sufficiency.

The Government does not contest these facts. J.A. 137-87.[2] The court below held that the Tucker Act and governing statutes afford a remedy for the Department's breaches of trust. The Navajo Nation respectfully urges this Court to affirm.

B. Factual Background

1. The relationship between the United States and the Navajo Nation is founded on two treaties. *See United States v. Wheeler*, 435 U.S. 313, 324 n.20 (1978). In the first, ratified in 1850, the Navajo Tribe submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo. 9 Stat. 974. In exchange, the United States promised to give the treaty a "liberal construction" and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo people. *Id.* at 975. The second, ratified in 1868, defined a reservation within the Navajo homeland. 15 Stat. 667. The part of the reservation at issue here was added by Executive Order of May 17, 1884, I Charles J. Kappler, *Indian Affairs, Laws and Treaties* 876 (1904), and confirmed by Congress in the Act of June 14, 1934, ch. 521, 48 Stat. 960.

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[2] **Pages 137 to 187 of the Joint Appendix reproduces only agreed facts,** citing to the appendix filed in the Court of Federal Claims. *See* C.A. App. A1982-A2065, A2703-A2727.

The coal at issue here is held in trust by the United States for the Navajo Nation. Pet. Br. 4.

The United States has exercised control over Navajo mineral leasing from the beginning. Secretary of the Interior Albert Fall stated that Indians as a rule were "not qualified to make the most of their natural resources," and that the federal government should therefore control them. U.S. Dep't of the Interior, *Annual Report of the Secretary of the Interior for 1921* 8 (1921). Under such control, some Fall-era oil leases generated bonuses for the Navajo of only $1,000—but netted $300,000 in spoils for those submitting "dummy" bids. Kathleen P. Chamberlain, *Under Sacred Ground: A History of Navajo Oil, 1922-1982*, 46, 60 (2000). Secretary Fall created the Navajo Tribal Council in 1923 for the "sole purpose" of making oil and gas leases in favor of his associates.[3] Faced with unrelenting pressure from Fall and the Standard Oil cartel, this first Council, whose delegates "were generally chosen by the [BIA] Superintendents," capitulated. *See* Chamberlain, *supra*, at 33-35; Kelly, *supra* note 3, at 69.

Congress' call for greater tribal self-determination in the 1930s fell on the deaf ears of federal agents in charge of the Navajo. *See* Young, *supra* note 3, at 93-94, 99-100. Federal regulations approved in 1938 retained provisions allowing only the BIA to call the Navajo Tribal Council into session. *Id.* at 113. As late as 1970, the Council "remain[ed] structurally and functionally dependent upon and responsive to . . . the Department of Interior." Aubrey W. Williams, *Navajo Political Process* 26 (1970).

[3] Robert W. Young, *A Political History of the Navajo Tribe* 55-58, 89-90 (1978); Chamberlain, *supra*, at 18-28, 50; *see generally* Lawrence C. Kelly, *The Navajo Indians and Federal Indian Policy: 1900-1935* 55-63 (1968).

2. In August 1964, the Department arranged and approved a lease of Navajo coal with a Peabody affiliate. *See* J.A. 210; Navajo Nation's Mot. for Summ. J., Court of Federal Claims docket no. 168, Vol. III at 1790. The lease set an "extremely low royalty rate," Pet. App. 36a,[4] but reserved for the Secretary unilateral authority to adjust that rate after 20 years. J.A. 194. In 1978, the Department's Office of Audit and Investigation pointed out the unfairness of the lease, under which the Navajo had received less than $2.7 million in royalties for coal resold by Peabody for over $141 million. J.A. 138. It urged the BIA "to exercise its trust responsibility and attempt to have these leases amended." *Id.* In March 1984, after several years of fruitless negotiations with Peabody, *see* J.A. 138-39, 143, and five months before the 20-year anniversary of federal approval of the lease, the Navajo Nation requested Interior Secretary William Clark to adjust the royalty rate. J.A. 139-40.[5] The BIA's Navajo Area Office responded, assuring the Navajo that the BIA was "pursuing our responsibility . . . by implementing an adjusted royalty rate as called for by the said lease." J.A. 140.

The Area Office sought technical advice from the Bureau of Mines and the BIA's Division of Energy and Mineral Resources (BIA's Minerals Division). J.A. 140-41. The Bureau of Mines recommended adjusting the royalty rate to 20%; BIA's Minerals Division to 24.4%. J.A. 6-7. On June 18, 1984, relying on the Bureau of Mines, the Area

[4] The royalty rate in the lease was capped at 37½ cents per ton. J.A. 191. In 1984, the coal commanded a market price of around $18 per ton, equating to a royalty rate of about 2%. *See* Pet. App. 2a.

[5] Contrary to Peabody's suggestions, there was nothing wrong with the Navajo Nation communicating with its trustee before commencement of adversarial proceedings. *See Joint Bd. of Control v. Acting Portland Area Director, BIA*, 22 IBIA 22, 25 & n.4 (1992).

Director notified Peabody that the royalty rate was adjusted to 20%, effective August 1984, twenty years after the Departmental lease approval. J.A. 8-9, C.A. App. A453.

Peabody and its two utility customers (the Southern California Edison Company (Edison) and the Salt River Project (SRP)[6]) appealed, invoking the formal appeal procedures of 25 C.F.R. pt. 2. J.A. 142. The appeal went to Deputy Assistant Secretary (and Acting Commissioner) for Indian Affairs, John Fritz. J.A. 143. Fritz stayed the effect of the adjustment decision during the appeal, causing the Navajo to lose about $50,000 each day the appeal languished. C.A. App. A453; J.A. 141. Edison instructed its counsel to "proceed[ ] on maximum delay mode in the appeal." J.A. 143.

Eventually, Peabody filed a study concluding that a fair royalty rate would be between 5.57% and 7.15%. J.A. 144. This is about one-half the "absolute minimum" for Indian coal established as binding Departmental policy shortly after Congress set the minimum royalty for federal coal at 12½% in 1976. J.A. 135; *see* 30 U.S.C. § 207(a). The Navajo Nation urged affirmance or lease cancellation based on Peabody's ongoing lease violations. J.A. 144-45; *see* J.A. 138. The Navajo expert report showed that, with the 20% royalty, fuel costs for the two power plants using Peabody coal would remain "among the cheapest in the Southwest." J.A. 10-11.

The BIA's expert, Vijai Rai, Ph.D., examined the technical reports for Fritz and reported that "based on

[6] Edison operates the Mohave Power Plant near Laughlin, Nevada, which is fueled entirely by coal transported from the Peabody mine via a dedicated slurry pipeline. C.A. App. 1537. SRP operates the Navajo Generating Station near Page, Arizona, which is fueled entirely by coal transported from the Peabody mine via a dedicated rail line. *Id.*

data currently available, a 20% royalty rate determination appears reasonable and defensible." J.A. 145-46. However, Dr. Rai recommended that Peabody be given one more opportunity to show that the 20% rate was unreasonable. *Id.* Fritz agreed and in March 1985 requested Peabody to supply additional cost and revenue data. J.A. 146-50.

Peabody refused to supply the data, so Fritz sought further technical input from the Bureau of Mines. J.A. 151. Its mineral economist and its mining engineer produced another report and an addendum, J.A. 24-72, concluding that Peabody would achieve a rate of return from 20.1% to 32.4% if the 20% royalty rate were upheld. J.A. 151. Dr. Rai then examined the Bureau of Mines' work and produced his final report. J.A. 73-88, 152. Dr. Rai found that the "coal deposits under lease to Peabody are exceptionally valuable" and recommended affirmance of the 20% rate. J.A. 86-88. No federal study ever concluded otherwise. J.A. 134, 153.

In June 1985, the Solicitor's Office drafted the decision for Fritz affirming the 20% royalty rate. J.A. 153. In late June or early July, the decision was finalized, copied, and check-marked for mailing to counsel of record, and awaited Fritz' signature upon his return from military reserve duty. J.A. 89-97, 153. As Fritz testified, it was "teed up" for his signature. C.A. App. A1245.

3. However, someone in the Department leaked the pending decision to Peabody. C.A. App. A1089-A1090; J.A. 155. The Navajo were never told of it. J.A.344-45 (testimony of former Navajo attorney and now Arizona Superior Court Judge Michael Nelson); J.A. 154-55. Peabody immediately wrote to Secretary Hodel and asked him to take personal jurisdiction over the appeal, but its July 5, 1985 letter was routed directly to Fritz. J.A. 155. Edison directed Peabody to retain Stanley Hulett, a close friend of Hodel, to influence Hodel to jettison the royalty adjustment. J.A. 157-58. Peabody's counsel in the appeal, Greg

Leisse, prepared Hulett to discuss the merits of the appeal in *ex parte* meetings with Hodel; the merits of the appeal were to be a central issue in those discussions. J.A. 158.

A July 22, 1985 Peabody memorandum sets forth in detail what happened then. J.A. 101-05.[7] Peabody's President Ken Moore told his lawyers to meet with Hulett and to determine if he "possessed the type of influence which would be required." J.A. 101. After meeting with Hulett, Peabody's lawyers agreed to

> allow Mr. Hulett to proceed on Peabody's behalf. He subsequently met with both Mr. Fritz . . . and Secretary Hodel on at least two (2) occasions. Secretary Hodel was sympathetic to Peabody's concerns and agreed that the parties to the lease should be encouraged to work out an agreeable resolution of the lease without interference from the Bureau of Indian Affairs. He agreed to, and subsequently did, sign a memo—drafted in part by Greg [Leisse] and myself—addressed to Mr. Fritz instructing him to (1) not make an untimely [sic] decision on the appealed case itself, and (2) encourage the parties to negotiate their differences.

J.A. 102.

Though unaware of these improper meetings,[8] the Navajo Nation's counsel did receive a copy of Peabody's July 5, 1985 letter to Hodel. J.A. 161. Navajo legal counsel

[7] Peabody immediately identified this memorandum internally as responsive to discovery subpoenae in this case, but concealed it for the next 2½ years, "agreements of counsel and court orders notwithstanding." *Navajo Nation v. United States*, 46 Fed. Cl. 353, 354 (2000), *aff'd*, No. 00-5072, 2002 WL 312117 (Fed. Cir. Mar. 29, 2001).

[8] As Hulett testified, "I had no contacts with the Tribe at that point that it would have made any sense for me to pick up the phone and say hey, oh, by the way, I'm going to do this to you." J.A. 160-61.

objected and repeated the Navajo's request that the Department decide the appeal. *Id.* The Solicitor's Office was then also unaware of the Secretary's deal with Peabody and, in response to Peabody's July 5 letter, simply added a paragraph to the decision rejecting Peabody's request. *Id.*; J.A. 113-14. On July 15, 1985—the same day that Peabody drafted Hodel's instructions—Assistant Solicitor Field "sent forward for signature" the revised decision affirming the royalty adjustment. J.A. 104-05, 106-16, 161-62.

Before Fritz could sign the decision, he received instructions from Hodel not to do so. J.A. 162-63. With the exception of one word, the body of Peabody's draft instructions had simply been retyped on Secretarial letterhead. *Compare* J.A. 104-05 *with* J.A. 117-18. Peabody was informed immediately of Hodel's instructions. *See* J.A. 101-02. The Department concealed these events from the Navajo. *See* Pet. App. 11a-12a, 32a, 40a-41a, 46a-47a.

Navajo Chairman Peterson Zah had also responded to Peabody's July 5 letter, again urging that the appeal be decided. J.A. 119-21. Associate Solicitor for Indian Affairs Tim Vollmann, ordered to respond to Zah, learned of Hodel's instructions and became "uncomfortable." J.A. 165. Vollmann sought an opportunity to brief the Secretary. J.A. 122. He warned that if the Navajo Nation learned of the instructions, it would likely sue. *Id.*

But Hodel's instructions were clear. J.A. 164. "[Y]ou would have to be brain dead not to understand what this is telling you. You're going to go back and consider this until hell freezes over is what you're going to do." C.A. App. A1648 (testimony of Deputy Assistant Secretary and Director of the Office of Trust Responsibilities Frank Ryan). Accordingly, Vollmann, a month after expressing his serious concerns about Hodel's actions, responded to Zah, stating that "a decision on the appeal is currently

being considered by the Deputy Assistant Secretary—Indian Affairs and his staff." J.A. 124-25. Both Vollmann and the drafter of his letter knew this was false. J.A. 122-23, 135-36, 168-69.

Vollmann's letter misled the Navajo leadership, who thought that it, coupled with a message that Hodel wanted negotiations begun anew, signaled that the Department could not support the 20% figure *on the merits*. J.A. 343, 358-59 (testimony of Judge Nelson); C.A. App. A3149-50. By contrast, Edison's 1985 negotiation notes show full disclosure by the Department to Edison. J.A. 126. Because of the Department's disloyalty and dishonesty, "the Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." Pet. App. 51a-52a; *see* J.A. 354-61 (testimony of Judge Nelson).

Peabody then reiterated its previous offer to raise the royalty rate to 12½%. *See, e.g.*, J.A. 17. The Navajo Nation rejected that offer in July 1986. C.A. App. A1563. In early 1987, a new Navajo administration sought to learn the status of the appeal through the BIA's Navajo Area Office. J.A. 170. The Area Director inquired, but was refused a status report, the only time that this happened in his career. *Id.*

4. During the two and one-half years of negotiations after Hodel's intervention, the Navajo Nation continued to receive negligible royalties. The Department knew the Navajo would get "beat up" in the negotiations. C.A. App. A1279-A1280 (Fritz testimony); C.A. App. A1643-A1644 (Ryan testimony); J.A. 185. But the Department continued to conceal from the Navajo both the *ex parte* deal and the federal studies supporting the 20% rate generated by the Bureau of Mines and Dr. Rai during the administrative appeal. J.A. 166-69, 359; C.A. App. A1284. In forcing those negotiations, the Department violated regulations prohibiting mineral lease negotiations unless desired by Indians

and generally restricting negotiations to thirty days. *See* 25 C.F.R. § 211.2 (1985); J.A. 174-75.

Facing "severe economic pressures," Pet. App. 3a, the Navajo Nation eventually caved in to Peabody's proposal for a facial royalty rate of 12½% and, considering other factors unique to this transaction, an effective royalty rate even less than that minimum rate for federal coal. *See* J.A. 181; C.A. App. A1973. This was considerably less than the 17.08% that the United States had set in readjusting one of its *own* coal leases just a year earlier, *see Peabody Coal Co.*, 93 IBLA 317 (1986), and little over half the 20% royalty rate that all federal studies had found reasonable for the superior Navajo coal, *see* J.A. 14-88. Furthermore, contrary to the Government's assertion, Pet. Br. 9, because of a pre-existing tax waiver on coal used at the Navajo Generating Station, which consumes over half the Peabody coal, the *total* of Navajo taxes and royalties for that coal cannot exceed 12½% under the lease amendments, much less approach the 20% figure found by the Department to be a fair royalty just for the coal. J.A. 179. SRP estimated the Navajo Nation's loss of royalty income just for the coal used at the Navajo Generating Station at $347.5 million. J.A. 156.

Numerous other provisions of the negotiated lease amendments also substantially harmed Navajo interests, contrary to the Government's suggestions. For example, the amendments eliminated the "extremely valuable" provision for future Secretarial adjustment in favor of neutral arbitration, *see* J.A. 178, 186, 286-87; they required the Navajo to forfeit $56 million in back royalties, Pet. App. 44a; and they leased an additional 90 million tons of Navajo coal for insubstantial bonuses and at the facial 12½% royalty rate. J.A. 279-81. The Navajo Nation also granted valuable tax concessions to get the facial 12½% deal, relinquishing $33 million in valid back taxes, Pet. App. 44a; and both confirming old tax waivers and granting new ones, J.A. 293-94, 298-301. The Department

knew that the Navajo Nation "gave up something for nothing" here, but did nothing. C.A. App. A2865 (Ryan testimony), A1661.

5. The Navajo Nation sought BIA review of the lease amendments. J.A. 172. The Navajo Area Office invoked normal procedures and requested review by the BIA's Minerals Division to determine if the proposed amendments provided proper benefits to the Navajo. J.A. 172-73. It did not receive any response. J.A. 173.

This was because the merits of the transaction were irrelevant to high-level DOI officials. J.A. 176. The approval process was described by Ryan as follows: "And my shop, what are we doing? We can't help, because we are not supposed to help .... The way this happened was, we were rubber stamping a review of a bunch of [lease] amendments that we weren't supposed to review...." C.A. App. A1659-A1661; J.A. 173.

Assistant Solicitor Field "assisted Peabody in shepherding the amended leases through the Department." J.A. 173. He assigned legal review of perhaps the largest Indian mineral transaction in history to an inexperienced lawyer who had just joined the Solicitor's Office. J.A. 173. Field did not inform that lawyer of the decision Field himself had forwarded for Fritz' signature, and the new attorney "didn't have the time" to review the reports generated by BOM and E&M in the royalty appeal. J.A. 174. His first memorandum observed that the lease amendments violated three regulations, including the one that should have governed the negotiations. J.A. 174.

On November 24, 1987, the Navajo Area Office recommended approval based on the erroneous belief that BIA's Minerals Division had performed an "in depth technical review" of the lease amendments. J.A. 175. A last-minute effort to generate a "technical review" on December 2, 1987 was simply a file-papering exercise. *See*

J.A. 176-80. Had the reviewer been informed just about the tax waiver for the coal used at the Navajo Generating Station, he would have recommended disapproval. J.A. 179. The irrelevance of this exercise was underscored when he delivered his review the day *after* Secretary Hodel promised Peabody's Vice President that he would approve the lease amendments, without any review. J.A. 132.

The lease amendment package went to Ryan, and a memorandum recommending approval was drafted for his signature. J.A. 182. Ryan refused to sign: "I knew—well, I thought that I would be participating in a breach of trust." J.A. 183. The package went forward anyway. J.A. 184. Assistant Secretary Ross Swimmer signed a memorandum prepared by Peabody and Field recommending approval. J.A. 185. After another meeting with Peabody executives, Hodel signed the Secretarial Approval document, also prepared in part by Peabody. J.A. 186. The Area Director's 20% royalty adjustment decision was vacated four days later. J.A. 186-87. Three days after that, SRP determined that "the impact of the approval of the new lease amendments should be negligible." J.A. 187.

C. Course of Proceedings

The Navajo Nation filed this suit in 1993. The Court of Federal Claims was outraged by the Government's misconduct:

> The basic duties owed a beneficiary by a trustee are clear—care, loyalty, and candor .... Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and

> then mislead the beneficiary concerning these events.

Pet. App. 48a-49a. However, the court dismissed for lack of jurisdiction.

The Court of Appeals for the Federal Circuit reversed. It determined that federal control and supervision over all aspects of Indian coal leasing establish a "clear and unqualified" duty to "manage the mineral resources for the benefit of the Indians." Pet. App. 11a. The Federal Circuit concluded that "[IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II* [*United States v. Mitchell*, 463 U.S. 206 (1983)]," Pet. App. 8a, and found that all of the Department's revenue-minimizing activities, from its collusion with Peabody to its rubber-stamp approval of the lease amendments, violated compensable fiduciary duties. Pet. App. 11a-12a.

In a separate opinion, Judge Schall concurred in the judgment. In Judge Schall's opinion, the Department's "failure to perform an economic analysis on the Agreement between Peabody and the [Navajo] Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 [(1985)] . . . amounted to a breach of a fiduciary obligation owed to the Nation" mandating compensation. Pet. App. 30a.

SUMMARY OF ARGUMENT

Congress has expressly provided a remedy in damages for Indian claims founded on treaties, statutes, or regulations. 28 U.S.C. §§ 1505, 1491(a)(1). If those treaties, statutes or regulations give the Government control or supervision over a tribal trust resource, they impose fiduciary duties to manage that resource for the benefit of the Indian beneficiaries, and form the "contours" of trust duties enforceable in the Court of Federal Claims. *Mitchell II*, 463 U.S. at 224-26.

There is no principled distinction between the statutory scheme governing Indian coal at issue here and that governing Indian timber in *Mitchell II*. Both statutes allow the Indian owners to convey the resource, but condition that ability on the Secretary's approval. In both cases, the Secretary exercises comprehensive control and supervision over virtually every stage of resource development. Both regimes are designed to assure that the Indians receive the greatest benefits the resource can reasonably generate. Thus, here, as in *Mitchell II*, the statutes and regulations that establish the Government's fiduciary obligations over Indian resource management should be interpreted as mandating compensation by the Government for damages sustained from breaches of basic trust duties.

To find liability, the Court of Appeals properly determined the contours of federal trust duties by examining the applicable statutes and regulations. It properly considered trust law standards to measure the Government's performance of its duties, consistent with an unbroken line of this Court's cases and with congressional intent, evidenced both in the Indian Tucker Act and in legislation requiring federal approval of Indian mineral transactions.

Under applicable statutes, the Secretary had a duty to control and supervise Navajo coal leasing for the Navajo Nation's benefit, not for the benefit of third parties. The Secretary breached those duties by scuttling a final decision upholding a 20% royalty rate adjustment, forcing the Navajo Nation back into extended negotiations contrary to his own regulations, and abusing his approval power under 25 U.S.C. § 396a by approving a mineral lease without analysis for a royalty rate far below what every federal study had concluded was reasonable. Liability must follow. "Spoliation is not management." *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937) (Cardozo, J., for a unanimous Court).

ARGUMENT

I. THE GOVERNING STATUTES, REGULATIONS, AND LEASE ESTABLISH TRUST DUTIES FOR FEDERAL MANAGEMENT OF NAVAJO COAL AND MANDATE COMPENSATION FOR BREACH OF THOSE DUTIES HERE.

A. The Tucker Act Waives Sovereign Immunity for Claims Founded on Statutes, Treaties, and Regulations Under Which the Government Exercises Trusteeship Over Indian Resources.

The Indian Tucker Act confers jurisdiction in the Court of Federal Claims over tribal claims arising under federal laws or treaties or "which otherwise would be cognizable in the Court of Federal Claims." 28 U.S.C. § 1505. Under the Tucker Act, such claims include those "founded either upon ... any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). *Mitchell II* held that the Tucker Act waived the Government's immunity for claims of breach of trust concerning federal management of Indian resources. "[S]tatutes and regulations [that] ... establish fiduciary obligations of the Government in the management and operation of Indian lands and resources ... can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." 463 U.S. at 226. In other words, such statutes and regulations provide proper predicates for jurisdiction in the Court of Federal Claims under the Tucker Act.

Mitchell II honored congressional intent. *See id.* at 214-15 & n.13. Congress enacted the Indian Tucker Act in 1946 as section 24 of the Indian Claims Commission Act. The House Report on that legislation is clear. "If we fail to meet these obligations by denying access to the courts when ... fiduciary duties have been violated, we

compromise the national hon r of the United States." H.R. Rep. No. 1466, at 4 (1945), *quoted in Mitchell II*, 463 U.S. at 215. In urging passage, sponsor Henry M. Jackson likewise stressed that "[t]he Interior Department itself suggested that it ought not be in a position where its employees can mishandle ... lands of a national trusteeship without complete accountability." 92 Cong. Rec. at 5312 (1946), quoted in *Mitchell II*, 463 U.S. at 214 n.13. The Government's position here contravenes this clear congressional intent as well as its own position at the time of enactment, and would "import immunity back into a statute designed to limit it." *See Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955); *Hearings on H.R. 1198 and H.R. 1341 Before the House Committee on Indian Affairs (Hearings)*, 79th Cong., 1st Sess. 130 (1945) (statement of Assistant Solicitor Felix Cohen).

The legal context in 1946 provides further support for *Mitchell II*'s conclusion that Congress intended a damage remedy for breaches of trust regarding Indian resource management. In 1946, an 1863 statute was understood to bar Indian tribes from suing in the Court of Claims to vindicate rights under federal law. *Mitchell II*, 463 U.S. at 214; H.R. Rep. No. 1466, *supra*, at 5. Tribes obtained such redress by securing special jurisdictional acts from Congress; between 1836 and 1946 Congress passed 142 such acts. F. Cohen, *Handbook of Federal Indian Law (Handbook)* 563 (1982). Before 1946 Congress also had to review the recommendations of the Court of Claims and appropriate the necessary funds. *See United States v. Dann*, 470 U.S. 39, 47 (1985). This pervasive congressional involvement with Indian claims bolsters the presumption that Congress knew the preexisting law when it enacted the Indian Tucker Act in 1946. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979).

The law in 1946 included (1) this Cour decisions in special jurisdictional act cases that held th Government liable for breach of fiduciary duties, established standards

of conduct, and emphasized trust duties of loyalty and care;[9] (2) Court of Claims decisions awarding damages for breach of trust in such cases;[10] and (3) the overlay of the Court's general philosophy of *ubi jus ibi remedium*, *see Bell v. Hood*, 327 U.S. 678, 684 & n.6 (1946). Here, context "clarifies text," *see Alexander v. Sandoval*, 532 U.S. 275, 288 (2001): Congress intended and expected that claims brought under the Indian Tucker Act would be decided under the rules established by this Court's decisions in special jurisdictional act cases which awarded damages for violations of federal trust duties and held Government officials to basic trust law standards.

The Government argues that Indians should be treated no differently than other claimants under the Tucker Act. *E.g.*, Pet. Br. at 22. Certainly, Congress sought to allow Indians equal *access* to the courts, but that does not mean that the substantive law on which tribal claims are predicated must be identical to that which would apply if there were no trust relationship. The relationship between the United States and Indian tribes is unique, "perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). It is "dominated" by a "'distinctive obligation of trust incumbent upon the Government.'" *Mitchell II*, 463 U.S. at 225 (citation omitted). Thus, the lives and properties of Indians are subject to an entire title of the United States Code

[9] *E.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 296-97 & n.12 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 115-17 (1938); *Klamath & Moadoc Tribes v. United States*, 296 U.S. 244, 255 (1935); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935).

[10] *See, e.g.*, *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 18-19, 40 (1944) (tribal negotiation of contracts "does not exonerate the Government from its responsibility" concerning their approval), discussed in H.R. Rep. No. 1466, *supra*, at 4. *See generally Hearings*, *supra*, at 73 ("A good many cases have come about where the Government has failed to discharge its duties as trustee properly.") (statement of Assistant Secretary McCaskill).

and to implementing regulations "derived from historical relationships and explicitly designed to help only Indians." *Morton v. Mancari*, 417 U.S. 535, 552 (1974). The Court of Federal Claims has jurisdiction over Indian claims of breach of trust founded on federal statutes that impose federal control over Indian trust resources, even though such statutes apply only to Indians.

The Government contends that to satisfy 28 U.S.C. § 1491(a)(1) an Indian claiming a breach of trust must show *both* federal control or supervision over the Indian property, giving rise to an active trust relationship with respect to that property, *and* "that the government violated a statute or regulation that would clearly mandate the payment of damages." Pet. Br. 16.[11] But as this Court explained in *Mitchell II*, if a statute or regulation is found to establish such a trust relationship with respect to Indian property—by giving the Government control or supervision over that property—that statute or regulation itself "can fairly be interpreted as mandating compensation for damages sustained," *Mitchell II*, 463 U.S. at 226, thus giving rise to trust duties enforceable under the Tucker Act. This is so, the Court went on, because "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id.; cf. United States v. Winstar Corp.*, 518 U.S. 839, 887 n.30 (1996) ("'Every breach of contract gives the injured party a right to damages against the party in breach . . . .'") *citing Restatement (Second) of Contracts*, § 346 Comment a (1981). In short, once an active trust relationship is found to arise from the statutory scheme, there is no need to go back and look for a separate "money mandating" statute or regulation to state a claim cognizable under the Tucker Act.

[11] The Government made essentially this argument, unsuccessfully, in *Mitchell II*. *See* Brief for the United States, No. 81-1748, at 19, 46-48; Reply Brief for the United States, No. 81-1748, at 2, 4, 8.

The Government's argument that the Tucker Act requires IMLA and other governing statutes and regulations to waive the Government's sovereign immunity, *e.g.*, Pet. Br. at 24, is unfounded. As the Court stated in *Mitchell II*, "[b]ecause the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 463 U.S. at 218-19. The Government's conflation of jurisdiction and the existence of a cause of action here reflects its "persistent confusion over the meaning of 'jurisdiction' as that term applies to claims against the United States under the Tucker Act." *Palmer v. United States*, 168 F.3d 1310, 1312-13 (Fed. Cir. 1999). Rather, as the Government conceded below, "[t]here is thus no question that the Court of Federal Claims had subject-matter jurisdiction over the Navajo's complaint . . . ." Brief of the United States, No. 00-5086, at 2.

B. The Statutes and Regulations That Govern Every Aspect of Indian Coal Leasing Parallel Those in *Mitchell II*.

Mitchell II recognized that "[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists . . . even though nothing is said expressly in the authorizing or underlying statute . . . ." 463 U.S. at 225 (citation omitted). Federal statutes and regulations govern virtually every aspect of coal mining activities on Navajo land, from the creation of leases to the reclamation of land. As the Court of Appeals determined, Pet. App. 8a-11a, this statutory scheme parallels that involved in *Mitchell II*.

1. Like the Indian timber at issue in *Mitchell II*, Indian minerals may not be conveyed without prior Secretarial approval. *See* 25 U.S.C. §§ 396a, 406(a). This requirement is rooted in federal statutes and policies going

back to the beginning of the Republic. *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 668 (1974). Congress has retained this "strong shield of federal law to the end that [Indians] be not overreached or despoiled in respect of their property of whatsoever kind or nature." *Sunderland v. United States*, 266 U.S. 226, 234 (1924). Exercising its war and treaty powers, "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence." *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).[12] The Secretary's power to approve leases was therefore " unquestionably . . . given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation." *Anicker v. Gunsburg*, 246 U.S. 110, 119 (1918). The approval authority in IMLA must be construed in light of this clearly established law and tradition. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (examining context to construe Indian treaty).

Until 1891, there was no general law authorizing mineral leasing of Indian lands. *See Indian Leases*, 18 Op.

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[12] That was especially true of the Navajo. The United States promised in the 1868 Treaty to provide schools and teachers, 15 Stat. at 669, but the Government defaulted on that obligation, 26 Cong. Rec. 7703 (1894). In 1947 "over 66% of the Navajo people had no schooling whatsoever and the median number of school years for the Navajo population was less than one." Robert W. Young, *Navajo Yearbook* 1 (1957). Thus, in 1964 when the Navajo Tribal Council considered a possible percentage-based royalty for the Peabody lease, at least one key Committee member did not understand the concept of a "percentage," and the Council accepted the cents-per-ton royalty that Peabody had proposed. *See* Navajo Nation's Mot. for Summ. J., Court of Federal Claims docket no. 168, Vol. I at 163; J.A. 191.

Att'y Gen. 486 (1886). Since then, Congress has enacted several laws doing so. Each requires affirmative Secretarial action for any lease to be effective.

An 1891 statute authorizes mineral leases of lands that Indians "bought and paid for . . . subject to the approval of the Secretary." 25 U.S.C. § 397. A 1924 statute amended the 1891 Act, authorizing leases of Indian lands for oil and gas to be offered "at public auction by the Secretary of the Interior." 25 U.S.C. § 398; *see Montana v. Blackfeet Tribe*, 471 U.S. 759, 763 (1985). Nonetheless, Secretary Fall attempted to lease lands withdrawn for exclusive Navajo use by executive order as if they were public domain lands. *See* Kelly, *supra* note 3, at 57. Then-Attorney General Harlan Fiske Stone disagreed with Fall. *See Executive Order Indian Reservations-Leasing Act*, 34 Op. Att'y Gen. 171 (1924). In 1927, Congress adopted Stone's position, providing that such minerals could be leased only "in accordance with the provisions" of § 398, *i.e.*, at an auction held by the Secretary for the Indians' benefit. *See* 25 U.S.C. § 398a.

Under a 1919 Act, the "Secretary of the Interior . . . is authorized and empowered . . . to lease" reservation land in Arizona and eight other states for metalliferous minerals. *See* 25 U.S.C. § 399, para. 1. That Act provides that leases "shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior." *Id.* at para. 6. The Act also authorizes the Secretary "to make such rules and regulations . . . as may be necessary and proper for the protection of the interests of the Indians." *Id.* at para. 17. Congress amended this Act in 1926 to allow leasing of coal and other "nonmetalliferous minerals, not including oil and gas" in Arizona and the other states, leaving intact the provisions protecting Indians' interests and providing for Secretarial lease adjustments after twenty years. Act of Dec. 16, 1926, ch. 12, 44 Stat. 922; *see* 25 U.S.C. § 399, para. 1.

Congress sought to consolidate and simplify mineral leasing procedures in the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g. IMLA's "basic purpose" is "to maximize tribal revenues from reservation lands," *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Congress enacted IMLA in large part because the earlier statutes were not "adequate to give the Indians the greatest return from their property." H.R. Rep. No. 75-1872, at 2 (1938). Contrary to the Government's bald assertion, Pet. Br. 44 n.16, IMLA did not repeal earlier leasing statutes such as those codified at 25 U.S.C. § 399. IMLA contains only a general repealer clause for inconsistent provisions. *Blackfeet*, 471 U.S. at 764.

Since enacting IMLA, Congress has enacted three statutes that reconfirm the Secretarial power to control Navajo mineral leasing. After World War II, Congress learned that 80% of Navajos were illiterate and 65% could not speak English, that all-weather roads were "practically nonexistent" on the reservation, that public health and other services were "completely inadequate," *see* H.R. Rep. No. 81-963, at 3-4 (1949), and that the Navajo were living in "abject poverty," S. Rep. No. 81-550, at 4-5 (1949). In response to these extremely bleak conditions, Congress enacted the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-640. That Act authorized the Navajo Tribe to lease its trust lands for "development or utilization of natural resources," 25 U.S.C. § 635, but conditioned that authority on the "approval of the Secretary of the Interior." *Id.* Congress enacted that law "to further the purposes of existing treaties with the Navajo Indians" and "to make available the resources . . . for use in promoting a self-supporting economy and self-reliant communities." 25 U.S.C. § 631.

In 1982, in the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-08, Congress both sought to extend a true measure of self-determination over the

disposition of tribal minerals and confirmed its view that a careless or disloyal exercise of the Secretarial approval duty under *IMLA* would subject the Government to liability. IMDA allowed tribes to negotiate minerals agreements, yet it, too, conditioned the validity of those agreements on Secretarial approval. 25 U.S.C. § 2102(a). The Department "strenuously oppose[d]" the bill unless a section were added "to hold the Secretary harmless from any damages based upon approval of any agreement." H.R. Rep. No. 97-746, at 13 (1982). Congress responded by confirming that Secretarial approval must promote "the best interest of the Indian tribe," 25 U.S.C. § 2103(b), by providing that nothing in the statute would "absolve" the United States from any trust duties, *id.* § 2103(e), and by exempting the Secretary from liability "for losses sustained . . . under [an] agreement" *only* "[w]here the Secretary has approved [the] Minerals Agreement in compliance with [IMDA] and any other applicable provision of law," *id.*

IMDA thus "simply restates the law" as it was under IMLA: "If the Secretary, acting as trustee, approves a lease . . . and acts responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability." H.R. Rep. No. 97-746, at 7-8. The Government characterizes such exercises of trusteeship as "second-guessing." Pet. Br. 39, 43, 48, but Congress has consistently required substantive federal review of conveyances of Indian minerals.

Most recently, in 2000 Congress reaffirmed federal control over—and impliedly recognized federal liability for—the disposition of Navajo minerals. In the Navajo Nation Leasing Act, Congress granted the Navajo Nation final authority to lease its trust lands, "except a lease for exploration, development, or extraction of any mineral

resources" which remain subject to Secretarial approval. 25 U.S.C. § 415(e)(1). The Act also provides that "[t]he United States shall not be liable for losses sustained" by the Navajo Nation only regarding leases consummated under that Act. *Id.* § 415(e)(5). Congress has the sole prerogative of determining when federal trusteeship over Navajo minerals is no longer needed. *Bunch v. Cole*, 263 U.S. 250 (1923). It obviously believes that this federal protection is still warranted.[13]

2. In addition to its control over disposition of Indian minerals, the Government exercises comprehensive supervision over those resources. IMLA is "comprehensive legislation" that "detail[s] uniform leasing procedures designed to protect the Indians." *Blackfeet*, 471 U.S. at 763-64. Under that Act, the Secretary has issued "comprehensive regulations," *Kerr-McGee*, 471 U.S. at 199, and exercises supervisory authority over Indian mineral leasing "in considerable detail," *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968). Federal "statutes and regulations govern[ ] virtually every aspect of [Peabody's] coal mining activities, from the creation of its leases to the reclamation of land." *Peabody Coal Co. v. State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988), *cert. denied,* 490 U.S. 1051 (1989); C.A. App. A3392-A3435.

• *Leasing and Operating Regulations.* Congress delegated rulemaking authority to the Secretary in IMLA. 25 U.S.C. § 396d. Under the Secretary's IMLA regulations, the BIA comprehensively supervises coal exploration permits, lease negotiations, bonding, the size and shape of leases, specific lease terms, approval or disapproval of

[13] So does the Department, which rejected proposals for greater deference to tribal leasing decisions under § 415, explaining "existing statutory authorities require meaningful review by the Secretary in carrying out the trust responsibility." 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001).

leases and mining plans, rental and royalty payments, permission to commence mining, promulgation and enforcement of "operating regulations," penalties for noncompliance with leases and regulations, and lease cancellation. 25 C.F.R. pts. 211 and 216, subpart A; Pet. App. 9a-10a; C.A. App. A3393. The Department promulgated IMLA regulations to ensure that Indian mineral resources "will be developed in a manner that maximizes their best economic interests," 25 C.F.R. § 211.1(a), and to be "consistent with the Federal government's role as trustee for these mineral resources," 61 Fed. Reg. 35,634 (July 8, 1996).

• *Rights of Way.* The Government's supervision of Navajo land and minerals is also exercised through its control of rights-of-way, which the Secretary can grant with tribal consent, 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169; J.A. 139. The statutes and regulations governing rights-of-way across Indian lands also serve to protect the Indians' "best interests," 33 Fed. Reg. 19,803, 19,804 (Dec. 27, 1968), and give rise to enforceable trust duties, *Mitchell II*, 463 U.S. at 223.

• *Resource Evaluation and Recovery; Prevention of Waste.* BIA regulations delegate some IMLA responsibilities to the Bureau of Land Management (BLM). BLM supervises exploration, resource evaluation, approval of drilling permits and mining plans, mineral appraisals, mining operations, inspection and enforcement, and production verification for Indian coal. 25 C.F.R. § 211.4 (incorporating 43 C.F.R. pt. 3480). In performing these functions, BLM exercises "the trust responsibility of the United States." 61 Fed. Reg. at 35,641.

• *Royalty Management.* BIA regulations incorporate by reference requirements of the Minerals Management Service (MMS) that cover royalty collection, accounting, and audit. 25 C.F.R. § 211.40. In the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757, Congress specifically required the Secretary to

address "the adequacy of royalty management for coal . . . on . . . Indian lands." FOGRMA § 303, codified at 30 U.S.C.A. § 1752, Hist. Notes. The Secretary satisfied this congressional mandate by establishing the Auditing and Financial System in 30 C.F.R. pts. 212 and 218, and applying it to solid minerals retroactive to June 1985, *see* 51 Fed. Reg. 15,763, 15,765 (Apr. 28, 1986); and by adopting the Production Auditing and Accounting System in 30 C.F.R. pt. 216, *see* 51 Fed. Reg. 8,168 (Apr. 8, 1986). MMS promulgated these regulations "to ensure that the trust responsibilities of the United States are discharged." 30 C.F.R. § 206.450(d).

• *Surface Mining, Reclamation, and Enforcement.* BIA first established special rules governing surface mining on Indian lands under IMLA in 1969. *See* 34 Fed. Reg. 813 (Jan. 18, 1969). These rules govern all stages of Indian coal surface mining, including exploration, development, operations and reclamation. 25 C.F.R. pt. 216, subpart A. Under the Indian lands section of the 1977 Surface Mining Control and Reclamation Act, 30 U.S.C. § 1300, Congress augmented federal control over Indian coal mining and lease amendments. *See* 25 C.F.R. pt. 216, subpart B (1985); 30 C.F.R. pt. 750. These regulations were *also* promulgated to satisfy "the Department's legal role as trustee of the natural resources of the Indian tribes." 42 Fed. Reg. 18,083 (Apr. 5, 1977).

It is hence "quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities," as the Court of Appeals found. Pet. App. 10a.

3. *Mitchell II* held that a comprehensive statutory scheme governing disposition of Indian trust resources imposed fiduciary resource management obligations on the Government and could fairly be interpreted as mandating compensation for damages caused by Government

mismanagement. *See* 463 U.S. at 226. While the Government repeatedly—but without support—proclaims otherwise, the statutory and regulatory scheme governing Indian mineral leasing and development is no less comprehensive than the scheme governing Indian timber in *Mitchell II*. Both allow conveyances by Indian owners subject to Secretarial approval. 25 U.S.C. §§ 396a, 406(a). In both, virtually every stage of conveyance and development is under federal supervision. *Peabody Coal Co.*, 761 P.2d at 1099; *Mitchell II*, 463 U.S. at 222. In both, the Secretary, through his approval power and through regulations, controls the amount and collection of compensation due the Indians. *See* 25 C.F.R. § 211.43(a); 30 C.F.R. pts. 212, 216, 218; *Mitchell II*, 463 U.S. at 220-23. Both are intended to protect against improvident sales and waste of the resource. Pet. App. 9a-10a; C.A. App. A3392-A3428; *Mitchell II*, 463 U.S. at 221. The principal goal of both statutory schemes is to ensure that the Indians receive the maximum benefit from their trust resources. *Kerr-McGee*, 471 U.S. at 200; *Mitchell II*, 463 U.S. at 221-22.[14] The Court of Appeals' determination that the IMLA scheme is analogous to the *Mitchell II* statutory scheme, *see* Pet. App. 8a-10a, 12a-13a, conforms with this

[14] *Accord See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1570 (10th Cir. 1984) (Seymour, J., concurring and dissenting) (*Supron*), *concurring and dissenting opinion adopted as majority opinion as modified*, 782 F.2d 855 (*en banc*), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986); *Kenai Oil & Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982); *Dawn Mining Co. v. Watt*, 543 F. Supp. 841, 843 n.8 (D.D.C. 1982). The monetary character of the governing statute "is a strong indication that a statute in itself . . . can fairly be interpreted as mandating compensation." *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., dissenting) (internal quotation marks omitted).

Court's observations in *Blackfeet* and *Poafpybitty* and with decisions of all the other lower courts that have addressed the issue.[15]

Stare decisis mandates adherence to *Mitchell II* here and compels affirmance of the Court of Appeals' determination that the Navajo Nation's claim is cognizable under the Tucker Act. The doctrine of *stare decisis*, one "of fundamental importance to the rule of law," *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 494 (1987), has special force in cases of statutory construction. *E.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998). There has been no intervening change in the law nor any indication that *Mitchell II* has proved unworkable or fostered inconsistency in the law. *Cf. California v. F.E.R.C.*, 495 U.S. 490, 499 (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). Additionally, *Mitchell II* has been cited with approval in nine decisions of this Court and over 700 decisions of the lower courts. *Cf. California*, 495 U.S. at 499. Finally, only a faithful application of *Mitchell II* under *stare decisis* principles would be consistent with "'a sense of justice.'" *See Patterson*, 491 U.S. 174 (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921)).

[15] *See Supron*, 728 F.2d at 1564 ("the statutory and regulatory scheme in *Mitchell II* parallels that involved here") and 1565 (IMLA "regulations detail in exhausting thoroughness the government's management . . . responsibilities"); *accord Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992), *cert. denied*, 507 U.S. 1003 (1993); *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv.*, 792 F.2d 782, 794 (9th Cir. 1986); *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 238 (1985).

C. The Applicable Statutes, Regulations, and Lease Establish Fiduciary Duties to Manage Navajo Coal in Accordance with Indians' Best Interests and Basic Trust Law Standards.

The mineral leasing statutes and regulations, the lease, and the treaties form the contours of the Government's trust duties here. *See Mitchell II*, 463 U.S. at 225. Actions taken by it within those contours are actions taken in the Government's capacity as trustee, and should be judged by familiar trust law standards.

1. Both courts below determined that IMLA, its implementing regulations, and this Court's precedents "place on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." Pet. App. 11a; Pet. App. 55a. These determinations are consistent with all of the reported decisions. *See supra* notes 14-15.

All relevant statutes provide that Secretarial oversight must be exercised in the Indians' best interests. *E.g.*, 25 U.S.C. §§ 396b; 399, para. 17; 631; 2103(b). That was the standard that the Department adopted in its Coal Leasing Policy on Indian Lands, in effect here at all relevant times. J.A. 2, 133-34. The "best interest" standard is a necessary incident of the IMLA scheme and purposes.[16] That standard is implicit in the restraint on alienation of Indian trust property.[17] It is inherent in the unique historic

[16] *See Blackfeet*, 471 U.S. at 763 (IMLA's provisions are "designed to protect the Indians"); *Poafpybitty*, 390 U.S. at 373-74 (referring to the Government's "trust duties" and "trust responsibility" under IMLA).

[17] *See, e.g., Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960) ("obvious purpose" of such restraint "is to prevent unfair, improvident or improper distribution by Indians of lands owned or possessed by them"); *Smith v. McCullough*, 270 U.S. 456, 464-65 (1926); *Anicker*, 246 U.S. at 119.

federal/Indian relationship against which Congress legislates. *See, e.g., Mitchell II*, 463 U.S. at 225-26; *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987); *Seber*, 318 U.S. at 715. A "best interest" standard is implicit in *any* trust relationship.

The Government here opposes reliance on the "best interest" requirement, whether in 25 U.S.C. § 399 or otherwise. Pet. Br. at 18, 33, 37-38, 44 n.16, 45. However, IMLA did not repeal, expressly or impliedly, that preexisting statutory requirement governing leases of nonmetalliferous minerals in Arizona such as Navajo coal. *See Blackfeet*, 471 U.S. at 764. Moreover, the Department formally adopted the "best interest" standard for *any* "administrative action affecting the interests of an Indian mineral owner . . . (such as approval of a lease . . .)," 25 C.F.R. § 211.3, both to conform with the Department's longstanding policy to "maximize [Indians'] best economic interests," 25 C.F.R. § 211.1(a), and to codify the holding of a 1982 case that the Department must "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands," *Kenai*, 671 F.2d at 387; *see* 61 Fed. Reg. at 35,634, 35,640. The Government forcefully argued for that very test below. C.A. App. A2993-97, A3191.

The Government contends that *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), indicates that the Secretary can ignore IMLA's basic purpose. *See* Pet. Br. 42. But that case concerned state taxation of non-Indian lessees, and the Interior Department has no responsibilities over state taxation of non-Indians. Moreover, in *Cotton*, "[i]mportant considerations of federalism took precedence over the Secretary's general duty to act on behalf of the tribe." *Burlington Resources Oil & Gas Co. v. Dep't of the Interior*, 21 F. Supp. 2d 1, 4 (D.D.C. 1998). No such considerations exist here, and the Department itself, both before and after *Cotton*, has ruled that it is duty bound to maximize tribal revenues under IMLA. *See*

General Crude Oil, 18 IBLA 326, 329 (1975); *Robert L. Bayless*, 149 IBLA 140, 150 (1999).

The Government's suggestion that it could have leased Navajo coal for 10¢ per ton based on a 1957 regulation, when the minimum royalty for federal coal was 12½% and when it knew that the proper royalty for the Navajo coal was closer to $4.00 per ton, *see* Pet. Br. 34, is disturbing and wrong. The Department's trust duty requires it "to review all leases and amendments to leases to assure that the rent and royalty received by the Indian tribe ... represents the best return that the market will bear." 3 *Am. L. of Mining* § 67.04[4][d], at 67-17 (1999). Thus, "the Secretary's discretion to approve or disapprove leases ... must be governed by fiduciary standards and limited by fiduciary duties." *Cheyenne-Arapaho Tribes*, 966 F.2d at 589. The United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate," to strive for the "ceiling" and not settle for the "floor." *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).[18]

2. "It is ... well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *Cherokee Nation*, 480 U.S. at 707. The commitments in the 1850 treaty indicate the Government's "willing assumption" of trust duties. *See supra* p. 3; *Supron*, 728 F.2d at 1563 n.1. The United States concedes that it must comply with basic trust duties. *See generally* Pet. Br.

[18] Peabody's amicus brief is predicated on a report that purportedly shows that "a royalty rate of 12.5% ... was as high as any of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states between 1985 and 1996." Peabody Br. at 2, 26-28. That assertion is false and its data are irrelevant. *See Peabody Coal Co.*, 93 IBLA 317 (1986); Navajo Nation's Reply to Opposition of Amici Peabody Coal Co., et al., to Motion to Strike Lodged Material; J.A. 83 (regarding inappropriateness of applying royalty rates for federal coal).

47 ("The United States fully accepts the implications of that [trust] relationship and the undertakings that go with it.").[19] However, it contends that the remedies available to Indians damaged by breaches of trust are limited to declaratory and injunctive relief, Pet. Br. 36-37, and that common law trust standards are irrelevant, *id.*, at 20, 49. *Mitchell II* rejected the first contention, *see* 463 U.S. at 227-28; *infra* pp. 47-49, and the second conflicts with congressional intent and an unbroken line of this Court's decisions, as discussed below.

The Government's duties over Indian mineral leasing are fiduciary in nature. *See Poafpybitty*, 390 U.S. at 373-74. In *Mitchell II*, the Court concluded that when governing statutes and regulations, like those here, impose on the United States "full responsibility to manage Indian resources and land for the benefit of Indians[, t]hey thereby establish a fiduciary relationship and define the *contours* of the United States' fiduciary responsibilities." 463 U.S. at 224 (emphasis added). "Contours" are outlines, providing a "framework for analysis." *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990); *see Faragher*, 524 U.S. at 788 (distinguishing "contours" from "definitive rules").

To fill in the "contours" of that relationship—in *Mitchell II*, to determine if a remedy in damages for breach existed—the Court relied on the three leading treatises regarding trust law standards. 463 U.S. at 225-26 & n.30. The *Mitchell II* dissent also understood that the "law of trusts generally will control." *Id.* at 237 n.11 (Powell, J., dissenting). The Court cited with approval several cases that relied on trust law standards to measure the Government's performance as trustee.

[19] The Government made the same statement in *Mitchell II*. Brief for the United States, No. 81-1748, at 44 ("We fully accept the implications of that special relationship and the obligations that go with it.").

First among those cited cases is *Seminole Nation v. United States*, 316 U.S. 286 (1942). The *Seminole* Court considered the Government's conduct as trustee in its disbursement of Indian monies. The Court could not have been clearer: the Government's conduct must "be judged by the most exacting fiduciary standards." *Id.* at 297. Significantly, the Court emphasized the duty of loyalty. "'A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.'" *Id.* at 297 n.12 (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.)). The duty of loyalty is still enforced with "'uncompromising rigidity.'" *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981) (quoting same); *Pegram v. Herdrich*, 530 U.S. 211, 224-25 (2000) (quoting same). Adherence to that duty at the Interior Department is of "particular importance" because of the temptation to compromise Indian interests in favor of other policies and programs. *Handbook* at 227-28. *Mitchell II* cited with approval several other cases that rely explicitly on the *Seminole* standard or the common law of trusts (or both) to measure the Government's performance as trustee. *See* 463 U.S. at 226 n.31.

Similarly, in *United States v. Mason*, 412 U.S. 391 (1973), this Court relied on the law of trusts to measure the performance of the Government's conduct as trustee. *Id.* at 391-92. Citing *Seminole*, the Court first observed that "[t]here is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust." *Id.* at 398. The Court then measured the Government's performance of its duty of care with reference to trust law standards. *Id.* (quoting Scott treatise).

Furthermore, *Nevada*—decided just three days before *Mitchell II*—quotes *Seminole* in affirming that "[t]his Court has long recognized 'the distinctive obligation of

trust incumbent upon the Government' in its dealings with Indian tribes." 463 U.S. at 127 *quoting Seminole*, 316 U.S. at 296. *Nevada* also recognized that "[i]t may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States." *Id.* at 142. This case presents just such a situation.

Contrary to Petitioner's assertion, Pet. Br. at 46, *Nevada* held that the Government's management duties over Indian trust resources differ from those of a private trustee *only* where Congress "by statute" has imposed conflicting duties on the Government. 463 U.S. at 128, 142; *cf. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001). Congress has imposed no such conflicting duties here. Furthermore, even when Congress *has* imposed such conflicting duties, the Court has recognized that Indian tribes may obtain relief in the Court of Claims for the United States' fiduciary failures. *See Nevada*, 463 U.S. at 135 n.14, 144 n.16; *Arizona v. California*, 460 U.S. 605, 627 n.20 (1983). Subsequent decisions of this Court confirm that trust law standards measure the Government's performance as trustee. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *Cherokee Nation*, 480 U.S. at 707; *Dann*, 470 U.S. at 50 n.13.

The Government's argument that its fiduciary duties are, at most, coextensive with specific statutory and regulatory commands, is unfounded. For example, the Government notes that the Indian timber statute requires that "proceeds from timber sales 'shall be paid to the owner or owners or disposed of for their benefit.'" Pet. Br. 27 (quoting 25 U.S.C. § 406(a)). The Government thus suggests that the absence of such a specific command in IMLA allows it to divert proceeds from Indian minerals to any third party free of liability to Indian owners. That

pinched reading of the trust duty contravenes the reasoning and holding of *Mitchell II* and Congress' intent to provide monetary remedies for federal mismanagement of trust resources. "If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996).

By enacting the Indian Tucker Act, Congress understood that the courts would use strict standards to measure the Government's performance as trustee. *See supra* pp. 16-18. Indeed, in 1946 the conference committee struck a provision in the bill that became the Indian Tucker Act directing the courts to apply "the same principles of law as would be applied to an ordinary fiduciary" in cases under the Indian Tucker Act, explaining "it is well settled that without express language the United States owes a very high degree of fiduciary duty to Indian Tribes, and the bill, by section 24, provides 'That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands or groups.'" 92 Cong. Rec. at 10,402 (statement of House conferees on Conference Report). That proviso was added to preclude the Government's present misconstruction of the Indian Tucker Act. *See Hearings*, *supra*, at 127, 130-31 (testimony of Assistant Solicitor Cohen).[20] With this background, Congress should be understood to have imported established principles of trust law, *see Amax Coal Co.*, 453 U.S. at 329, at least as a starting point, *see Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000); *Varity Corp.*,

[20] That proviso was itself dropped "as surplusage" in the 1949 codification of that section as 28 U.S.C. § 1505, "since the provision conferring jurisdiction cannot in any way alter the relationship of the Government with its Indians." H.R. Rep. No. 81-352, at 15 (1949).

516 U.S. at 496-97; *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

Where, as here, the scope of duty is a question of federal law and Congress has understandably not specified all acts or omissions that would constitute compensable breaches of trust, the character of the Government's trust duties *should* be explicated by accepted principles of trust law as a "necessary expedient." *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985). Moreover, "the scope of the United States' fiduciary duty in administering the [Indians'] trust property is a question of federal law." *Mason*, 412 U.S. at 397 n.9. Such federal law requires nationwide legal standards; thus, the interstices of the remedial scheme will be filled with uniform *federal* rules. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), *cited in Mason*, *supra*.

The Government's fear that entrusting courts to fill in these contours will subject the United States "to liability based on unanchored, judge-made concepts of common law,"[21] is as unfounded in the trust law context as it is in the contract or tort law context.[22] It is precisely because

[21] Brief for the United States, *United States v. White Mountain Apache Tribe*, No. 01-1067, at 12, 34. The Government here simply paraphrases without attribution the words "unanchored judge-created principles of fiduciary law" that it borrowed from a dissenting Court of Claims judge and quoted in its unsuccessful *Mitchell II* brief. Brief for the United States, *United States v. Mitchell*, No. 81-1748, at 45.

[22] Once a contract claim passes Tucker Act muster, the dispute is governed by "federal common law of contract," Developments in the Law, *Remedies Against the United States and its Officials*, 70 Harv. L. Rev. 827, 884 (1957), under which breach and remedies issues are decided mainly based on the *Restatement* and respected treatises. *See Mobil Oil Expl. & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-08 (2000); *Franconia Assoc. v. United States*, 122 S. Ct. 1993, 2002 (2002). The Court's approach in tort claims against the United States is similar. *See Richards v. United States*, 369 U.S. 1, 6 (1962).

the basic features of trust law are so well known that the *Mitchell* framework, informed by trust law principles, offers stability and predictability. *See Amax*, 453 U.S. at 330; *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 716 (2002) (contours of the term "equitable relief" are so well known that courts rarely need to inquire further than the Restatement and respected treatises). Indeed, trust law principles will often limit the Government's liability to Indians. *See, e.g., Dann*, 470 U.S. at 48; *Mitchell II*, 463 U.S. at 237 n.11 (Powell, J., dissenting); *Mason*, 412 U.S. at 398.

This Court and the lower courts have taken into account the uniqueness of the federal/Indian relationship and have placed limits on the Government's potential liability, limits appropriate to the unique context of the federal trust. For example, *Nevada* recognized that the Department of the Interior cannot be held to the "fastidious standards of a private fiduciary" when Congress has specifically imposed conflicting duties on it. 463 U.S. at 128. Similarly, *Pawnee* recognized federal trusteeship over Indian mineral leases, but rejected liability for claims that would have required Interior officials to contravene the regulations and lease terms that formed the "contours" of the trust duties. 830 F.2d at 191-92.

Most importantly, in fashioning these federal rules, the courts will "look to the common law and other history for guidance . . . 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent" in enacting IMLA and the Indian Tucker Act. *See Burns v. Reed*, 500 U.S. 478, 493 (1991) (citation omitted); *see also Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994). Here, Congress contemplated use of basic trust law standards when it enacted the Indian Tucker Act. *Mitchell II* honored that clear congressional intent, and the Court of Appeals did so as well.

D. The Department Violated Compensable Trust Duties by Shelving a Well-Supported Lease Adjustment for Peabody's Benefit, Misleading the Navajo Nation and Forcing It to Negotiate, and Rubber-Stamping Lease Amendments at Sub-Minimum Royalty Rates.

In this case, the Department exercised its control not to assist the Navajo Nation to become self-sufficient, but to benefit Peabody at the Navajos' expense. Pet. App. 3a. The Department violated its duty to adjust the royalty rate under the original lease, *see* 25 U.S.C. § 399, para. 6; Lease, art. VI, J.A. 194; its duty to supervise and limit negotiations to prevent unfairness and overreaching, *see* 25 C.F.R. § 211.2 (1985); and its duty to review and approve any proposed coal lease with care to promote IMLA's basic purpose and the Navajo Nation's best interests. *See* 25 U.S.C. § 396a; *Kerr-McGee*, 471 U.S. at 200. These breaches of fundamental trust duties are compensable under *Mitchell II*.

1. In addition to the governing statutes and regulations, *Mitchell II* recognized that "other fundamental document[s]" help define the contours of the Government's trust duties. *Mitchell II*, 463 U.S. at 225. When the Government approves a mineral lease pursuant to a federal statute and exercises reserved trust authority under that lease, the lease is a "fundamental document." *See Pawnee*, 830 F.2d at 192; 30 C.F.R. § 206.450(b). A faithful exercise of the right to adjust the royalty rate here, the most important financial term of the lease, lay well within the "contours" of both IMLA and 25 U.S.C. § 399. The Government's administration of that lease provision was a trust function. *See Supron*, 728 F.2d at 1567.

All federal studies found that a 20% royalty rate adjustment by the BIA Area Director in 1984 was fair and reasonable. J.A. 134, 153. But, at Peabody's *ex parte* behest, the Secretary signed instructions to Acting Commissioner Fritz drafted by Peabody's lawyers that jettisoned a well-supported royalty adjustment and effectively reverted the royalty rate to 37.5¢ per ton indefinitely. *See* J.A. 118 ("If it becomes inevitable that such a [royalty adjustment] determination must be made by the Department, then we can discuss it at that time."); C.A. App. A1670. The Secretary did this in violation of the duty of loyalty, "the most fundamental duty owed by the trustee to the beneficiaries." Austin W. Scott, *et al., The Law of Trusts* § 171, at 311 (4th ed. 1987); *Amax*, 453 U.S. at 329-30.

The loyalty of the Navajo Nation to the United States "has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return." *See Shoshone Tribe*, 299 U.S. at 486; Pres. Proc. No. 6847 (1995). Such fidelity was conspicuously lacking at the Interior Department, but was restored by the court below.

2. The Department chose to deceive the Navajo Nation, Pet. App. 11a-12a; J.A. 167-69, in violation of basic trust principles. "[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries." *Varity Corp.*, 516 U.S. at 506. The Department's false and cryptic communications reasonably led the Navajo leadership to conclude that the Department believed the 20% figure was vulnerable on the merits. *Cf. Earll v. Picken*, 113 F.2d 150, 158 (D.C. Cir. 1940) ("The trustee's duty of disclosure is not discharged by leaving the cestui to draw doubtful inferences, conclusions and suspicions . . .").

As Judge Baskir observed below, "[a] negotiator's weapon is knowledge. . . . Unaware that the Secretary had already promised their opponents he would not decide the dispute, the Navajo Nation, arguably already at a

competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody and the utilities. . . ." Pet. App. 51a-52a; *see* C.A. App. 1280. Hodel's instructions, drafted by Peabody, were a perfect instrument for the companies' "maximum delay" strategy. *See* J.A. 143, 169; C.A. App. A1648.

By contrast, applicable regulations allowed mineral leasing negotiations only when sought by the Indian mineral owner, and generally limited those negotiations to thirty days. 25 C.F.R. § 211.2 (1985). This regulation "is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources." Pet. App. 57a. The Department wilfully violated it. J.A. 174-75. Any doubts about its construction should be resolved in the Indians' favor. *See Blackfeet*, 471 U.S. at 766; *Supron*, 728 F.2d at 1567.

The Department knew that the Navajo Nation did not have the staying power of Peabody, the world's largest coal company, and Edison, one of the country's largest investor-owned utilities. *See* J.A. 137-38. These companies were paying virtually nothing for Navajo coal while negotiations dragged out. By contrast, the Navajo Nation was struggling to provide water, electricity, and paved roads for its citizens; "[t]he need for money was great, and it was growing daily." J.A. 355 (testimony of Judge Nelson). The Department knew that the Navajo Nation would get "beat up" in the years-long negotiations. *See* J.A. 185; C.A. App. A1280, A1643-44.

Such actions breach compensable trust duties. An Indian tribe may recover damages for breach of trust where federal officials mislead it about the value of its resources or withhold knowledge of that value to the tribe's detriment. *See Klamath*, 296 U.S. at 255. The Department's active collusion with Peabody also constitutes a compensable breach of trust. "[F]raud or gross negligence in the actual conduct of the United States as trustee, or in the conduct of its agents, will make the

Government liable for damages in breach of trust." *Coast Indian Cmty. v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1977), *cited in Mitchell II*, 463 U.S. at 226 n.31.

3. As Judge Schall's concurrence emphasized, a fundamental trust responsibility under IMLA, and one rooted in statutes dating back to the beginning of the Republic, is the duty to exercise the federal lease approval power in the Indians' best interest. *See* Pet. App. 26a-27a; *supra* pp. 20-21. The Secretary must, as trustee, "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *Mason*, 412 U.S. at 398 (citation omitted).

By contrast, once Secretary Hodel was assured the lease amendments were desired by Peabody, *see* J.A. 175, the merits of the deal from the Navajo Nation's perspective became "irrelevant." J.A. 176. Determining a proper royalty rate by the United States for its *own* coal is not "irrelevant." *See Peabody Coal Co.*, 93 IBLA 317 (1986) (adjusting royalty for federal coal to 17.08%). The lease amendments Hodel approved also abrogated the Department's right to adjust the royalty rate forever, but the United States has never relinquished that right for its own coal, J.A. 186, and the lease provided for such abrogation only "[i]n the event of termination of federal jurisdiction," J.A. 186, 194.[23] Such approval of these and many other damaging terms, *see supra* p. 11,[24] did not comply with fundamental requirements of a trustee's duty of care.

[23] Peabody had long been trying to abrogate this trust authority, *see Hearings Before the Senate Select Committee on Indian Affairs on S. 1894*, 97th Cong., 2d Sess. 108 (1982) (Peabody, through Farrand, seeks legislation to subject IMLA disputes to arbitration).

[24] The Government's suggestion that the Navajo Nation did not seek to invalidate the lease in the Court of Federal Claims because it liked some of the terms, Pet. Br. 32, 40, is baseless. At argument,

(Continued on following page)

The Secretary's exercise of his approval power was required to conform to the basic purpose of IMLA, to maximize tribal revenues, and that of the Navajo and Hopi Rehabilitation Act, to "further the purposes of existing treaties with the Navajo Indians" by "promoting a self-sustaining economy and self-reliant communities," 25 U.S.C. § 631. The Department's manuals "prescribe economic appraisals of the transactions between Indians and private companies such as Peabody." Pet. App. 58a. Here, however, "[i]t is undisputed that . . . DOI failed to perform any economic analysis regarding the lease amendments." Pet. App. 27a (Schall, J.). This unconsidered approval violated the trustee's duty of care. *See Mason*, 412 U.S. at 398; *Cheyenne-Arapaho*, 966 F.2d at 589.[25]

SRP estimated the Navajos' loss in royalties for the coal used at just one of the two power plants at $347 million, and Edison estimated the Navajos' loss of back royalties and taxes alone at $89 million. J.A. 187, Pet. App. 44a. A few scholarships and increased water payments cannot make up for that.[26]

Navajo counsel simply recognized that the Court of Federal Claims had no authority to invalidate an approved lease, and characterized the few beneficial terms of the lease amendments as providing "chump change" to the Navajo. C.A. App. A3088, A3123-A3127.

[25] The instructions to Fritz drafted by Peabody's lawyers and signed by Hodel advert to the threat of litigation. Pet. Br. 8. Though even a *genuine* "threat of litigation may be intimidating . . . careful analysis of relevant factors takes precedence over avoiding a lawsuit." *Cheyenne-Arapaho Tribes*, 966 F.2d at 590. Regardless, the Navajo Nation was prepared to defend the royalty adjustment in litigation, as it had informed its trustee. *See* C.A. App. A751.

[26] The Government argues that the royalty rate for coal jointly owned by the Navajo and Hopi was also raised from 6.67% to 12½%. *See* Pet. Br. at 4 n.3, 9. However, that limited rate increase only damaged the Navajo further, and damaged the Hopi as well. The Navajo had already raised royalty rates of other inequitable coal leases to 12½%

(Continued on following page)

II. OTHER VARIANTS OF THE GOVERNMENT'S UNSUCCESSFUL ARGUMENTS IN *MITCHELL II* SHOULD BE REJECTED.

The Government's arguments here generally repackage its unsuccessful arguments in *Mitchell II*. As discussed above, *Mitchell II* rejected its views that an Indian plaintiff may only prevail if it shows a violation of a specific statute or regulation that in itself clearly mandates compensation for its violation, and that trust law standards are too imprecise to apply to the Department. And, as explained below, real or feigned respect for tribal self-determination does not excuse violation of basic trust duties, federal law does not limit Indians damaged by breaches of trust to prospective relief, and the Government's casual invocation of private right of action cases cannot negate jurisdiction conferred by the Tucker Act. These arguments also failed to convince the Court in *Mitchell II* and should again be rejected. *See Babbitt v. Youpee*, 519 U.S. 234, 245 (1997).

A. The Ideal of Tribal Self-Determination Does Not Dilute Trust Duties.

In the space of 20 pages, the Government's brief transforms the modern federal policy favoring tribal self-determination from a supposed "focus" of IMLA to its "central aim." *See* Pet. Br. 18, 19, 20, 38. *Contra Kerr-McGee*,

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despite the lack of adjustment provisions in those leases. J.A. 175-76. Here, as Peabody and its customers recognized, if the royalty rate here were adjusted to 20%, the royalty rate for the jointly owned coal would have risen to the same figure. *See* J.A. 157. The Government's assertion that the Navajo Nation "has made no . . . claim" that a reasonable trustee could not have believed the lease amendments were in the tribe's "best interest," Pet. Br. 33, is nonsense. That is what this case is all about. First Am. Compl. ¶¶ 17, 21-24; C.A. App. 36, 40-41.

471 U.S. at 200. It repeatedly offers, never with any citation to authority, that the historic requirement of federal approval of Indian land transactions is merely to give "backstop protection" to the tribes, whatever that might be. *E.g.*, Pet. Br. 18, 43, 49. *Contra Tuscarora*, 362 U.S. at 118-19; *Sunderland*, 266 U.S. at 234. The Government unsuccessfully asserted in *Mitchell II* that the federal policy favoring Indian self-determination compromises trust duties. *See* Brief for the United States, No. 81-1748, at 35. That argument has gained no force in the intervening 20 years.

In fact, IMLA's only nod to tribal self-determination was to prevent the Secretary from leasing tribal minerals over the Indians' objections. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 Tulsa L. J. 541, 558-61 (1994). IMLA and its implementing regulations "leave no significant authority in the hands of the Indian tribes." Pet. App. 10a; Royster, at 565. But even if IMLA allowed tribes to exercise significant management authority, the Government presents a false dichotomy.

President Nixon, who forged the Indian self-determination policy, found vigorous enforcement of the trust duty and respect for tribal self-determination to be complementary. President Nixon sought to ensure Federal support for tribal self-determination by emphasizing, not limiting, the trust duty. Focusing on the Indians' "natural resource rights," President Nixon emphasized that "[e]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573.

President Reagan continued that policy. "In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we

hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished with the highest standards." President's Statement on Indian Policy, 1983 Pub. Papers 96. President George H. W. Bush reaffirmed that the federal trust duty over natural resources was "an obligation of the highest responsibility and trust," to be judged "by the most exacting fiduciary standards." Statement on Signing the Department of the Interior and Related Appropriations Act, 1991, 26 Weekly Comp. Pres. Doc. 1768, 1769 (1990).

In both the Indian Self Determination and Education Assistance Act and later amendments to that Act promoting tribal self-governance, Congress provided that greater tribal authority shall not compromise Federal trusteeship. *See* 25 U.S.C. §§ 450n(2), 458ff(b). Congress embraced this principle specifically in the Indian mineral context. Congress enacted IMDA in 1982 "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources." S. Rep. No. 97-472, *supra*, at 2. But, even under IMDA, if the Secretary exercises his approval authority "recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability." H.R. Rep. No. 97-746, *supra*, at 7-8; *accord* S. Rep. No. 97-472, *supra*, at 4-5.

In this case, the Navajo Nation consistently stated its position to the Department: it requested the royalty to be adjusted as provided by the lease and it sought a decision on Peabody's appeal of the adjustment decision. *See, e.g.*, J.A. 12, 119-21, 139-40, 161, 165; C.A. App. A468. Had the Department truly respected Navajo decision-making, it would have decided the appeal on the merits, not forced the Navajo Nation to negotiate at a decided disadvantage.

The Department did not advance the policy of respect for tribal self-government when it colluded with Peabody. Honest consultation with, not deception of, Indian tribes is

the cornerstone of the modern federal-tribal relationship. *See, e.g.*, Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 6, 2000). "[W]hile the trust responsibility should support self-determination, that goal is illusory if it results from a compromised process or undue federal manipulation . . . ." Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1558. Indeed, as the Department recognizes, "maximiz[ing] the economic return on Indian mineral development [helps] to achieve greater Indian self-determination." 42 Fed. Reg. 18,083 (Apr. 5, 1977). Minimizing that return, as here, surely undermines tribal self-determination.

B. The Navajo Nation Had No Effective APA Remedy Here, and *Mitchell II* Rejected the Government's Argument That Such Remedies Preclude Monetary Relief.

The Government urges that the Navajo Nation's sole recourse is an action for equitable relief under the Administrative Procedure Act. *See* Pet. Br. at 36-37. *Mitchell II* rejected this argument, because "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227. That is especially true here, where, unlike timber, the coal resource is non-renewable and the Government concealed from the Navajo Nation for years its subversion of Navajo interests. Even Government counsel was unaware of the depth of the Government's misconduct until well into discovery in this case. *See* C.A. App. A2093-94 nn.5-6; A3149-50.

The Navajo Nation's claim is not a quibble over procedural niceties, as the Government contends. *Ex parte* communications that do no harm to Indians would indeed

be a mere technical wrong. Here, however, the *ex parte* communication led the Secretary to suppress a finished decision favoring the Navajo, to hide his actions and conceal valuable information from the Navajo, and, ultimately, to agree to approve damaging lease amendments with no substantive review. Even if Peabody's advances had not been made surreptitiously, those actions would still mandate compensation. The Secretary "cannot escape his role as trustee by donning the mantle of administrator." *Supron*, 728 F.2d at 1567.[27]

Surely, claims not seeking injunctive relief rely on allegations of past wrongdoing. But that general truism does not mean that the Navajo Nation's claim here is simply second-guessing. *Cf.* Pet. Br. 43. *Nevada* is instructive on this point. *Nevada* rejected a tribe's claim that *did* rely in part on hindsight, but distinguished such hindsight from the type of facts present here:

[27] Even where parties have purely procedural claims and the agency has complied with its own procedural rules, agency action may still be challenged "in order to afford the aggrieved individuals due process" or if there is "a totally unjustified departure from well-settled agency procedures." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 542 (1978). "It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. . . . [D]ue process forbids it." *Camero v. United States*, 375 F.2d 777, 781 (Ct. Cl. 1967) (*en banc*). Moreover, Solicitor Richardson had previously warned Secretary Hodel not to meet *ex parte* with Peabody, J.A. 148-49, and after Hodel ignored that advice, the Associate Solicitor for Indian Affairs warned that the Secretary had denied the Navajo due process by adopting Peabody's desired course of action, J.A. 122-23. The Department's Office of Hearings and Appeals, the Secretary's "authorized representative," 43 C.F.R. § 4.1, had forbidden *ex parte* communications with Interior decision makers, "whether or not they are prohibited by statute or regulation." *Pueblo of Laguna v. Assistant Secretary for Indian Affairs*, 12 IBIA 80, 97, 90 Interior Dec. 521, 531 (1983).

> there is nothing in the record in this case to indicate that any official outside of the BIA attempted to influence the BIA's decisions in a manner inconsistent with these [trust] obligations. The record suggests that the BIA alone may have made the decision . . . for reasons which hindsight may render questionable, but which did not involve other interests represented by the Government.

Nevada, 463 U.S. at 135 n.15. Here, in contrast, the BIA did everything correctly before being stopped in its tracks by the Secretary acting on behalf of Peabody.

Determining the Government's liability in this case requires no hindsight. The Department knew when it jettisoned the royalty rate adjustment and forced more negotiations that the Navajo would suffer. *E.g.*, C.A. App. A1641-44. The Department knew that the Navajo coal should have commanded a 20% royalty when it approved the sub-12½% deal. J.A. 14-88. Hodel knew that his actions were improper. *See* Pet. App. 31a-32a; J.A. 148-49.

C. The Implied Right of Action Doctrine Does Not Apply Here.

The Government drops oblique references to cases that concern implied rights of action. Pet. Br. 24. "However, the legion of cases in which tribes have sued to enforce Indian rights protected by treaties, statutes and executive orders have proceeded without undertaking that analysis." *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002), *citing Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). In the Tucker Act, Congress expressly waived sovereign immunity concerning actions for money damages. *Mitchell II*, 463 U.S. at 216, 218-19. The question of implication is therefore moot. *See Cannon*, 441 U.S. at 694.

This issue was briefed by the Government and discussed at argument in *Mitchell II*, *see* Brief for the United States, No. 81-1748, at 27-28 & n.23; Tr. of Oral Arg. at 32-40 (Mar. 1, 1983), yet it merited not a word in the majority opinion and only a brief statement in the dissent, *see* 463 U.S. at 232 (Powell, J., dissenting). *Mitchell II* decided that the Tucker Act confers jurisdiction over tribal claims for breach of trust. If jurisdiction were denied here based on lack of an implied right of action, *Mitchell II* would be effectively overruled. Such a result would be "demonstrably inequitable" and should be avoided. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104 (1991); *see also Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 292 (1993). Moreover, the Government did not seek such a drastic ruling in either its Petition or its brief, and its brief accepts the *Mitchell II* framework. Therefore, this Court has no reason to reconsider *Mitchell II*, through the guise of the implied right of action doctrine or otherwise. *See, e.g., Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

PAUL E. FRYE*
ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & FRYE, LLP
500 Fourth Street NW, Suite 400
Albuquerque, NM 87102
(505) 243-1443
Counsel for Respondent Navajo Nation

**Counsel of Record*

APPENDIX

NAVAJO AND HOPI REHABILITATION ACT OF 1950

25 U.S.C. §§ 631-40

§ 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

* * *

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

* * *

§ 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

* * *

§ 635. Disposition of Lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with

the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

* * *

§ 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

* * *

25 U.S.C. § 399

§ 399 Leases of unallotted mineral lands withdrawn from entry under mining laws

[para. 1] *Authority of Secretary of Interior to lease.* The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming withdrawn prior to June 30, 1919, from entry under the mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, and nonmetalliferous minerals, not including oil and gas, which leases shall be irrevocable, except as herein provided, but which may be declared null and void upon breach of any of their terms.

* * *

[para. 6] *Term of lease; renewal.* Leases under this section shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods.

* * *

[para. 15] *Examination of books and account of lessees.* The Secretary of the Interior is authorized to examine the books and accounts of lessees, and to require them to submit statements, representations, or reports, including information as to cost of mining, all of which statements, representations, or reports so required shall be upon oath, unless otherwise specified, and in such form and upon such blanks as the Secretary of the Interior may require; and any person making any false statement, representation, or report under oath or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28 shall be subject to punishment as for perjury.

[para. 16] *Disposition of rentals and royalties.* All moneys received from royalties and rentals under the provisions of this section shall be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the reservation where the leased land is located, which moneys shall be at all times subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress: *Provided,* That such moneys shall be subject to the laws authorizing the pro rata distribution of Indian tribal funds.

[para. 17] *Protection of interests of Indians.* The Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect: *Provided,* That nothing in this section shall be construed or held to affect the right of the States or other local authority to exercise any rights which they

may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

* * *

TRIBAL SELF-GOVERNANCE AMENDMENTS

25 U.S.C. § 458

§ 458ff Disclaimers

* * *

(b) Federal trust responsibilities

Nothing in this subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments.

* * *

TREATY WITH THE NAVAJO INDIANS.
June 1, 1868

* * *

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be

provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provision of this article to continue for not less than ten years.

* * *